Office-Supreme Court
FILED
APR 28 1981
ALEXANDER L. STEVAS
CLERK

No. 80-~~6052~~ 1652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In the Matter of the Arbitration

—between—

INTERNATIONAL PRODUCE, INC.

Petitioner,

—and—

A/S ROSSHAVET, Owners of the S.S. ROSS ISLE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN C. MOORE
Counsel for Respondent
A/S ROSSHAVET
HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, New York 10004

MARK C. FLAVIN
Of Counsel

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
1. The Decision Below is not in Conflict with any Decision of this Court or of any other Court	4
2. The Finding Below is Limited to its own Facts	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	PAGE
Andros Cia. Nav. S.A. v. Marc Rich & Co. A.G., 579 F.2d 691 at 701 (2d Cir. 1978)	8
Bell Aerospace Co. Division of Textron, Inc. v. Local 516, Int'l Union of United Auto Aerospace and Agriculture Implement Workers of America, 500 F.2d 921 (2d Cir. 1974)	4
Commonwealth Coatings Corp. v. Continental Casualty Corp., 393 U.S. 145 (1968)	2, 4, 5, 6, 7
Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975); *cert. denied*, 425 U.S. 944 (1976)	8
Fukaya Trading Co., S.A. v. Eastern Maritime Corp., 322 F. Supp. 278 (E.D. La. 1971)	4
Miserocchi & Co. S.P.A. v. Peavy International Inc., 78 Civ. 1571 (S.D.N.Y. Sept. 15, 1978)	7
Pando Compania Naviera S.A. v. Filmo S.A.S., 1 Lloyd's List Law Reports, 560 (Queens Bench, 1975)	9
Reed & Martin Inc. v. Westinghouse Electric Corp., 439 F.2d 1268 (2d Cir. 1971)	4
Sanko S.S. Co. v. Cook Industries Inc., 495 F.2d 1260 (2d Cir. 1973)	6, 8
Saxis Steamship Co. v. Multifacs International Traders, Inc., 375 F.2d 577 (2d Cir. 1967)	4
Standard Tankers (Bahamas) Company Limited v. Motor Tank Vessel AKTI, 438 F. Supp. 153 (E.D.N.C. 1977)	5
Transmarine Seaways Corp. v. Marc Rich & Co., A.G., 480 F. Supp. 352 (S.D.N.Y. 1979), *aff'd without opinion*, 614 F.2d 1291 (2d Cir. 1979); *cert. denied*, 445 U.S. 930 (1980)	6, 7

PAGE

United States v. International Business Machines, 475 F. Supp. 1372 (S.D.N.Y. 1979) 8

United States Wrestling Federation v. Wrestling Division of the AAU, Inc., 605 F.2d 313 (7th Cir. 1979)..... 6, 7

United States v. Zagari, 419 F. Supp. 494 (N.D. Cal. 1976)..... 8

Other Authorities:

9 U.S.C. § 10 ..... 1, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In the Matter of the Arbitration

—between—

INTERNATIONAL PRODUCE, INC.

Petitioner,

—and—

A/S ROSSHAVET, Owners of the S.S. ROSS ISLE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, A/S Rosshavet ("Rosshavet"),* respectfully submits this brief in opposition to the petition of International Produce Inc. ("International") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

1. Are the standards set forth in 9 U.S.C. § 10 the sole grounds for vacating an arbitration award?

2. Did the Court of Appeals err in concluding under the unique facts of the present matter that there was no reasonable basis for concluding a challenged arbitrator displayed evident partiality for or against either party to the arbitration?

---

* A/S Rosshavet is a publicly owned Norwegian corporation with two wholly owned subsidiaries, A/S Ross Rig and Ross Drilling Co. A/S.

STATEMENT OF THE CASE

The facts are succintly and accurately set forth in the Court of Appeals' opinion (2a-6a), but Rosshavet respectfully invites the Court's attention to certain highly significant facts which were stated inaccurately or omitted in International's "Statement of Facts".

International fails to state that at the first arbitration hearing on September 9, 1977, all three Arbitrators disclosed relationships with the parties and their counsel pursuant to the rules of the Society of Maritime Arbitrators, and the mandate of this Honorable Court in *Commonwealth Coatings Corp. v. Continental Casualty Corp.*, 393 U.S. 145 (1968). All three Arbitrators disclosed contacts with International or its parent corporation, while only one, the Third Arbitrator, Mr. Hammond L. Cederholm, disclosed a contact with Rosshavet's counsel. Cederholm stated that the firm of Haight, Gardner, Poor & Havens, ("Haight, Gardner") was handling a Protection and Indemnity ("P and I") Club matter for one of his employer's principals (3a). Neither party availed itself of the Panel's invitation to question the Arbitrators further, and both sides accepted the Panel with full knowledge of each Arbitrator's relevant contacts. If International had inquired further concerning the P and I matter, it would have learned it involved the vessel, MARY S (3a).

On December 6, 1977, an evidentiary hearing was held in the ROSS ISLE arbitration and Rosshavet presented its case through the testimony of witnesses who had traveled from Norway and Louisiana. Because of the illness of the Arbitrator appointed by Rosshavet, Rosshavet's witnesses were heard (and seen) only by the Arbitrator appointed by International and by the Third Arbitrator, Mr. Cederholm.

On December 8, 1977, another dispute involving the MARY S arose. International's petition fails to state that neither Mr. Cederholm nor his employer James W. Elwell Co. ("Elwell") had any financial interest in the MARY S, or her owner, World

Carrier Corporation, since Elwell was paid a fixed management fee regardless of the vessel's profitability (3a-4a).

International's petition intimates that Elwell and Mr. Cederholm made the decision to retain Haight, Gardner to represent the vessel's interests (Petition, p. 5). On the contrary though, the P and I Club's New York representative, Frank B. Hall & Co. ("Hall"), recommended that Haight, Gardner represent the vessel's interests in the second MARY S case (4a). Hall was acting on behalf of the P and I Club, Assuranceforeningen Gard, which had been represented in New York by Haight, Gardner since 1936. The manner in which the second MARY S matter was referred to Haight, Gardner was the same manner in which the first MARY S case had been referred.

International's petition states that after Mr. Carey became aware of his Firm's involvement in the second MARY S case, there followed "a rash of correspondence" (Petition, p. 5). In the course of that correspondence, the other two arbitrators, Messrs. Nelson and Klosty, urged Mr. Cederholm to remain on the Panel. Haight, Gardner's reason for urging Mr. Cederholm not to withdraw, recognized by the Court of Appeals (5a) but not mentioned in the petition herein, was that "if Cederholm withdrew there would be only one Arbitrator who had observed Rosshavet's witnesses", which would have prejudiced Rosshavet. Both Arbitrators stressed that the type of situation under consideration was unavoidable in the small interconnected maritime community of New York (8a-9a). Finally, after Rosshavet's counsel and the other two Arbitrators urged Mr. Cederholm to remain on the Panel, International's counsel wrote to Mr. Cederholm and expressed confidence that he could "continue to act judiciously and objectively without partiality or bias" (5a). Notwithstanding that expression of confidence, International's counsel formally requested that Mr. Cederholm withdraw.

REASONS FOR DENYING THE WRIT

1. The Decision Below is not in Conflict with any Decision of this Court or of any other Court.

The statutory grounds enumerated in 9 U.S.C. § 10 are the exclusive grounds for vacating an arbitration award, and the burden of proving the existence of such grounds rests with the party seeking vacation. *Bell Aerospace Co. Division of Textron, Inc. v. Local 516, Int'l Union of United Auto Aerospace and Agriculture Implement Workers of America*, 500 F.2d 921 (2d Cir. 1974); *Reed & Martin Inc. v. Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971); *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967); *Fukaya Trading Co., S.A. v. Eastern Maritime Corp.*, 322 F. Supp. 278 (E.D. La. 1971).

The Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, *supra*, did not expand the statutory grounds to include an "appearance of bias". *Commonwealth Coatings* involved the failure of an arbitrator to disclose that he had earned approximately $12,000 for consulting services rendered to a party to the arbitration. Some of those services were performed on projects involved in the arbitration.

The Court reversed the Court of Appeals and District Court's confirmation of the award on the ground the failure of disclosure of the financial relationship with a party to the arbitration constituted "evident partiality". 393 U.S. at 148. Justice Black concluded his plurality opinion with the statement that tribunals permitted by law to try cases and controversies must avoid even the "appearance of bias". 393 U.S. at 150. The core of Justice Black's opinion, though, was that failure of disclosure in some instances will constitute an irrebuttable presumption of "evident partiality". 393 U.S. at 148.

The Court's holding in *Commonwealth Coatings* becomes clear when the concurring opinion of Justices White and

Marshall is considered. While those Justices concurred with the plurality opinion, they noted:

> "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges or indeed of any judges . . . it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party [to the arbitration], that fact must be disclosed." 393 U.S. at 151-152.

Two Justices therefore disassociated themselves from the sweeping dicta employed by Justice Black, including the phrase "appearance of bias", and restricted the scope of the Court's decision to situations where business and financial dealings with a party to an arbitration were not disclosed by an arbitrator.

Justice Fortas, joined by two other justices, dissented from Justice Black's opinion, maintaining that a failure to disclose constitutes a rebuttable presumption of "evident partiality", and that such a presumption was rebutted by the record before the Court. 393 U.S. at 154.

Rosshavet submits that a reading of all the opinions in the *Commonwealth Coatings* case reveals that the Supreme Court did not expand 9 U.S.C. § 10 to create a new criterion, "the appearance of bias", as a ground for vacating arbitration awards. Rather, the Court held that the arbitrator's failure to disclose business and fianancial dealings with a party to the arbitration resulted in a presumption of the existence of "evident partiality".

Subsequent decisions expressly rejected the contention that an "appearance of bias" is a ground for vacating an award. In *Standard Tankers (Bahamas) Company Limited v. Motor Tank Vessel AKTI*, 438 F. Supp. 153 (E.D.N.C. 1977), the Court held the arbitrator's relationship to the parties must be evaluated under the "evident partiality" standard.

Indeed, this Court's denial of certiorari in *Transmarine Seaways Corp. v. Marc Rich & Co., A.G.*, 480 F. Supp. 352 (S.D.N.Y. 1979), *aff'd without opinion*, 614 F.2d 1291 (2d Cir. 1979); *cert. denied*, 445 U.S. 930 (1980), mandates denial of the present writ. In *Transmarine Seaways*, the party seeking to vacate the award relied exclusively on the assertion that an arbitrator's continued presence on the Panel in the face of the party's challenge constituted "an appearance of bias". The District Court noted that the matter differed from *Commonwealth Coatings*, since there was no failure to disclose and no income producing relationship between the arbitrator and the party. 480 F. Supp at 357. The opinion then addressed the respondent's heavy reliance on the "appearance of bias" language from *Commonwealth Coatings*:

> "Because it professes to perceive in the circumstances of this case 'the appearance of bias', Rich contends that Nelson should have been disqualified without more. *But there is no authority in the cases for so subjective a standard*". 480 F. Supp. at 358 (emphasis added).

Since the respondent was unable to cite any other ground for challenge to the arbitrator, the Court concluded that there was no impropriety in his participation, precluding a challenge on that ground. 480 F. Supp. at 358.

As noted above, the Court of Appeals affirmed the District Court without opinion, and this Court denied the petition for a writ of certiorari. The petition similarly should be denied in the present matter, especially in light of International's counsel's expression of confidence in Mr. Cederholm's abilities and integrity (5a).

International also cites the decisions in *Sanko S.S. Co.* v. *Cook Industries Inc.*, 495 F.2d 1260 (2d Cir. 1973) and *United States Wrestling Federation* v. *Wrestling Division of the AAU, Inc.*, 605 F.2d 313 (7th Cir. 1979). Rosshavet submits that neither case is of relevance in the present matter. *Sanko S.S.*, unlike the present matter, was a non-disclosure case, involving

the failure of an arbitrator to disclose his extensive relationships with a party and its counsel. The Court did not discuss the statutory criteria for vacating awards when the adequacy of disclosure is not the issue. *United States Wrestling Federation*, similarly was a non-disclosure case where the Court's inquiry centered on whether an arbitrator's failure to disclose a connection with a member of an organization which was a party to the arbitration constituted "evident partiality". 605 F.2d at 318.*

In light of the above, there is no conflict between the Court of Appeals' decision in the present matter and any decision of this Court or any other Court of Appeals.

2. The Finding Below is Limited to its own Facts.

All of the Justices in *Commonwealth Coatings* acknowledged that arbitrators' ties to the market place are not merely unavoidable, but are necessary and desirable as the base of experience which uniquely qualifies arbitrators to resolve commercial disputes. That view is particularly applicable to the shrinking American shipping industry, where the community of businessmen and qualified arbitrators is small and substantial contacts among them are inevitable in a large proportion of cases.

In fact, the New York community of businessmen and admiralty lawyers engaged in the resolutions of charterparty

---

* International relies on the unreported case of *Miserocchi & Co. S.P.A. v. Peavy International Inc.*, 78 Civ. 1571 (S.D.N.Y. Sept. 15, 1978) to support its position. In that case, an arbitrator disclosed that he had received commissions totaling $41,073.33 from one of the parties, but refused to withdraw when he was challenged at the outset of the arbitration. The District Court vacated the award. Clearly, a direct financial connection between a party and an arbitrator gives rise to an irrebuttable presumption of "evident partiality". However, that case does not stand for the proposition that if at any time in the course of an arbitration a party alleges an arbitrator's presence creates an "appearance of bias", the arbitrator must withdraw. *Transmarine Seaways Corp. v. Marc Rich and Co., A.G., supra.*

disputes may be likened to a small county seat in which the judges, lawyers and businessmen are all well acquainted with each other, the fact that they are acquainted constituting a form of discipline in itself.

Whether such ties are too remote to constitute bias or to create a presumption of evident partiality is a question of fact in each individual case. *Andros Cia. Nav. S.A. v. Marc Rich & Co. A.G.*, 579 F. 2d 691 at 701 (2d Cir. 1978); *Sanko S.S. Co. Ltd. v. Cook Industries Inc., supra* at 1264, n. 3. The present matter involves a unique set of facts and relationships, which is most unlikely to ever occur again.

Rosshavet submits the numerous factual distortions and embellishments which are contained in the petition were inserted in an attempt to obfuscate the fact Internanational's case is essentially a contention that a commercial arbitrator's appearance as a witness in an arbitration where members of two law firms are adversaries results in positive and negative biases being engendered toward attorneys. It is argued that those biases then are transferred to other members of those firms who are adversaries in another arbitration in which the commercial man is sitting as an arbitrator. Finally, those biases are said to be transferred to the attorneys' clients in the second arbitration, even though those clients had no connection to the other arbitration.

The Court of Appeals rejected that argument, accurately noting it does not follow that an arbitrator's personal feelings in favor of or against one attorney necessarily would be transferred to another attorney in the same firm and then to the second attorney's client (8a).

Courts have expressly held that a judge's alleged partiality or bias towards a party's attorney is insufficient to disqualify a judge from hearing and deciding a case. *United States v. International Business Machines*, 475 F. Supp. 1372 (S.D.N.Y. 1979); *United States v. Zagari*, 419 F. Supp. 494 (N.D. Cal. 1976). In *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975); *cert. denied*, 425 U.S. 944 (1976), a party

sought disqualification of a judge on the grounds of bias, because in another action the presiding judge had become embroiled in a bitter conflict with the party's counsel. The Court refused to disqualify the judge noting:

> "They [the complaining party] seek disqualification on an imputation theory—the bias against their lawyer is imputed to them. Read broadly, this preemptory challenge type approach would bid fair to decimate the bench. Lawyers, once in controversy with a judge, would have a license under which the judge would serve at their will." 517 F.2d at 1050.

Even assuming International's imputation theory had some vitality, Rosshavet submits that commercial arbitration is not an event which generates bias or emnity, for in the words of the Court in *Pando Compania Naviera S.A. v. Filmo S.A.S.*, 1 Lloyd's List Law Reports, 560 (Queens Bench, 1975):

> "The shipping and commodity trades of the world are unusual in that they do not regard litigation or arbitration with abhorrence. *On the contrary, they regard it as a normal incident of commercial life—a civilized way of resolving the many differences of opinion which are bound to arise.* Would that the same intelligent attitude were adopted within industry." 1 Lloyd's List Law Reports at 562 (emphasis added).

The Court of Appeals considered the facts of the present matter and concluded as fact that Mr. Cederholm's contact with the two law firms in the ROSS ISLE arbitration could not result in his being biased against International, and/or in favor of Rosshavet. Indeed, the Court noted there was "no claim of animosity toward any counsel" and no evidence of anything remotely resembling evident partiality (8a). The present matter is not a disclosure case and is unique in the sense that International complains of a situation which was created by its counsel's decision to represent a party in another arbitration, after the ROSS ISLE arbitration had commenced and Ros-

shavet had presented its witnesses. Rosshavet respectfully submits that there is nothing which warrants this Honorable Court's review of the Court of Appeals' factual conclusion concerning that unique situation.

CONCLUSION

In light of the above, Rosshavet respectfully submits that the petition herein should be denied.

Dated: New York, New York
April 28, 1981

Respectfully submitted,

JOHN C. MOORE
Counsel for Respondent
A/S ROSSHAVET
HAIGHT, GARDNER, POOR & HAVENS
One State Street Plaza
New York, New York 10004

MARK C. FLAVIN
Of Counsel